

THE YALE LAW JOURNAL

VOLUME 59

DECEMBER, 1949

NUMBER 1

JUSTICE MURPHY: THE GOALS ATTEMPTED

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"What doth the Lord require of thee, but to do justly, and to love mercy,
and to walk humbly with thy God?"

Micah 6:8.

THE late Justice Murphy was the most underestimated member of the Supreme Court in our time.¹ The bulk of lawyers' talk about him for years has been hostile and patronizing. Sometimes the attack has been violent, charging that Murphy knew no law, that he was merely reading his personal predilections into his decisions.² Even when friendly, it has still been patronizing, as when the commentator observed that Murphy seemed to reach fairly happy results even though he lacked proper concern for legal techniques.³ The common elements in both attitudes has been the observer's judgment that Murphy was "subjective," and either inadequately mindful of rules and precedents, or ignorant of them.

The charge of "subjectivity" is particularly inappropriate if it suggests that Murphy's jurisprudence was a product not of philosophy, but of whim. It is doubtful if any Justice ever kept a firmer wall between his personal predilections and his public ideals.

Judge Learned Hand, in a eulogy of Cardozo, observed on the remarkably impersonal quality of Cardozo's justice. Cardozo could

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1. Bibliographical note on Justice Murphy's judicial career: Justice Murphy took his seat on the Supreme Court on Feb. 5, 1940, and his opinions are reported in 309 U.S. to 338 U.S. For a very short, but remarkably prescient essay upon his appointment see Bates, *The New Supreme Court Judge: An Appraisal*, 26 A.B.A.J. 107 (1940). The most extended article on his opinions is Barnett, *Mr. Justice Murphy and Civil Liberties*, 32 CONN. L.Q. 177 (1947). The 12th chapter of McCUNE, *THE NINE YOUNG MEN* (1947) is on Murphy. PRITCHETT, *THE ROOSEVELT COURT* (1948) refers frequently to Murphy, and my own articles in 15, 16, and 17 U. OF CHI. L. REV. on the work of the Court for the term preceding the issue of the REVIEW discuss Murphy's opinions along with those of his brethren. They will be cited hereinafter as, e.g., Frank, 15 CHI. L. REV. 1 (1947). The MICHIGAN LAW REVIEW will publish an issue in his memory and articles on Murphy by Pickering and Gressman are currently under preparation for the CHICAGO and COLUMBIA LAW REVIEWS. Mr. Gressman, an attorney in Washington, D.C., is at present the custodian of the enormous collection of Murphy papers.

2. For journalist samples of the hostile and patronizing variety, see Editorial, Washington Post, July 20, 1949, p. 12, col. 3; Schlesinger, *The Supreme Court, 1947*, Fortune, Jan., 1947, p. 73.

3. See, e.g., McCUNE, *op. cit. supra* note 1, at 151.

"weigh the conflicting factors of his problems," said Hand, "without always finding himself in one scale or the other."⁴ In an odd sense the same is true of Murphy, for the values and ideals which he found in the scales were frequently denials of his own personal preferences.

Thus Murphy, who had been a labor candidate as a politician, in the lifetime security of the Bench continued as a poor man's judge; yet in his purely personal life, he had no overwhelming interest in labor affairs and socially was almost exclusively in the company of those groups against whom he was deciding on the Bench. Professor Swisher's chapter, "The Octopus," in his biography of Justice Field describes the manner in which the social lobby absorbed judges and strengthened their conservatism.⁵ The social lobby furnished Murphy with the bulk of his friends, but left his views completely unaffected.

Again, Murphy was a civil liberties judge. Yet his relations with Father Coughlin, the complete antithesis of everything Murphy publicly stood for, were apparently close enough so that Murphy's affectionate family saw no incongruity in asking Coughlin to conduct the funeral services.⁶

It was particularly in his relations to his church and his religious faith that Murphy put aside what must have been pressing personal considerations to take what he considered a public view on the issues before him. There could have been no more devout Catholic than he, and it would have been readily understandable if he had found a happy coincidence between the convenience of his church and the mandates of the law. Yet no one was more firm than Murphy in upholding the rights of the Jehovah's Witnesses, a bigoted sect which makes a speciality of anti-Catholicism.⁷

Murphy's stand in the Jehovah's Witnesses cases could have been discarded by his critics as bravado, a gesture of no consequence; or it might be rationalized as an indirect protection of Catholicism by building a bulwark for minorities. But in the great church and state cases of recent years,⁸ Murphy's position was so obviously independent of his creed as to call forth impassioned criticism from many of his fellow religionists,⁹ and he once heard his stand denounced at Sabbath serv-

4. Hand, *Mr. Justice Cardozo*, 48 YALE L.J. 379, 381 (1938).

5. SWISHER, STEPHEN J. FIELD, c. IX (1930).

6. N.Y. Herald Tribune, July 21, 1949, p. 14, col. 8. The service was conducted by Rev. James Marvin, who applauded the "Christian spirit" in Murphy's opinions. N.Y. Times, July 23, 1949, p. 12, col. 2.

7. The cases are considered below; and see Barnett, *supra* note 1, at 188 *et seq.*, and McCUNE, *op. cit. supra* note 1, at 142 *et seq.*

8. *Everson v. Board of Education*, 330 U.S. 1 (1947) (school bus case); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (released time case).

9. Responsible Catholic criticism of opinions in which Murphy joined, though hard-hitting, was of course impersonal. See, e.g., Butler, *No Lamb of God in School*, 167 CATH. WORLD 203 (1948). Less responsible criticism was extremely personal. Mr. Gressman, custodian of the Murphy papers, informs me that a very great volume of bitter clippings were sent to Murphy.

ices. At times Murphy's position on legal issues coincided with the position of his church on the underlying social issue involved, and at times it conflicted.¹⁰ We may deduce that the principles guiding his decisions were quite apart from his Catholicism.

Independence of church was accompanied by independence of party. Murphy clearly was no rubber stamp for either the Roosevelt or the Truman administration, and when he thought they exceeded their powers, he was quick to say so. Not even the cry of "wartime unity" could rally him to the administration when he disagreed with it, and he freely rejected the wartime policy as to the Japanese-Americans, the President's policy in Hawaii, and the war crimes trials. He stood firm against the administration in the coal strike of 1946.¹¹

In sum, to say that Murphy was reworking the law in terms of his personal ideals is a far different thing from saying that he was a subjectivist, a sort of gastronomical jurisprude using his power to promulgate his desires as law. If his decisions did not always flow from the precedents, they also did not flow from his whims. They were based on a philosophy sufficiently deeply worked out to Murphy's own satisfaction to withstand criticism. The application of that philosophy may on occasion have been defective, for Murphy is open to the charge that occasionally he let activities he opposed hide behind symbols he cherished. When he thought that child labor should, in a peculiar instance, be tolerated as an expression of religious conviction;¹² when he voted to eliminate subpoenas almost entirely in administrative hearings;¹³ when he let a claim of freedom of speech becloud his vision of suppression of free speech by monopoly in radio and press¹⁴—in these instances, he may have deluded himself, though he intended to hold to his objectives. But these episodes are rare, for his philosophy guided him in a remarkably consistent course.

Coordinate with the charge of subjectivity has been the charge of technical incompetence. It is true that Murphy was unconventional in his treatment of legal materials, but the evidence rejects the suggestion that he could not have been a conventional lawyer if he had chosen.¹⁵ His opinions were usually well written, and some achieve

10. For examples of conflict, see cases cited note 8 *supra*. Examples of coincidence are the divorce cases, as *Williams v. North Carolina*, 325 U.S. 226 (1945); *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (dissenting opinion).

11. The cases referred to in this paragraph are cited and discussed below.

12. *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944).

13. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 218 (1946); see *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 510 (1943).

14. *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *Associated Press v. United States*, 326 U.S. 1, 49 (1945).

15. He frequently chose to be as conventional as anyone could desire. Examples are his many tax opinions in which he spoke for the Court in situations of great technical complexity; see, e.g., *Jones v. Liberty Glass Co.*, 332 U.S. 524 (1947); *Commissioner v. Sunnen*, 333 U.S. 591 (1948). He was not a trail-blazing tax expert, and some of his

greatness whether measured in terms of legal skill displayed or in terms of any other values.¹⁶

The larger insufficiency in this attack is in its assumption that Murphy's work ought to be measured in terms of rules, precedents, and the conventions of legal methodology. Perhaps it should, for certainly, even in this age of instrumentalism, these are still overwhelmingly dominant standards. But even assuming the validity of the allegation that he was indifferent to legal doctrine, Murphy is also entitled to be appraised by his own standards. What were these standards and how successfully did they enable him to achieve, not the goals which others think he should have set, but the goals which he himself did set?

His own standards represented a substantial ideal in the American culture, the ideal of the just judge who substitutes wisdom and kindness for booklearning and achieves what are, in popular ideology, far more wholesome results than does the legal technician. To many Americans, more often in the 18th and 19th Centuries than now, there is something a little slick in finding the solutions to human problems in books. That distrust resulted in such phenomena as making layman juries the judges of law as well as of fact, the practice of permitting non-lawyers to be judges, the practice of permitting anyone of good moral character to practice law.¹⁷ Though that set of values seems to be dying away in the 20th Century it remains in the jury system, which some of its students believe retains considerable vitality primarily as an emergency exit through which the citizen escapes from the law.¹⁸

Hence to say that Murphy was a policy making judge in a more extreme sense than all judges are policy makers, or to say that he completely subordinated technical considerations to humane results, is not to oust him from all claims to American affection.¹⁹ The very conduct charged represents for many an important American idea.

It is not necessary here to assess the validity of that ideal. The ideal exists. Murphy is not the first to subordinate legal science to public policy—Marshall was even freer in making his cases fit his purposes—

opinions, after the fashion of tax opinions, have created as many problems as they solved, as, *e.g.*, *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U.S. 108 (1945); *Commissioner v. Flowers*, 326 U.S. 465 (1946); *Commissioner v. Wilcox*, 327 U.S. 404 (1946); but his many tax opinions are certainly executed in accordance with normal legal standards.

16. For an example of a superb Murphy opinion in a difficult area of conflict of laws, see *Industrial Comm. v. McCartin*, 330 U.S. 622 (1947); and see the cases collected in note 98 *infra*.

17. The theme is enlarged and documented in Chapter V of the forthcoming work of HURST, *A HISTORY OF THE PRINCIPAL AGENCIES OF LAW*, to be published by Little, Brown & Co. early in 1950.

18. James, *Functions of Judge and Jury*, 58 YALE L.J. 667, 685-90 (1949).

19. *Contra*: Schlesinger, *supra* note 2; Powell, *Behind the Split in the Supreme Court*, N.Y. Times, Oct. 9, 1949, § 6, p. 13, col. 1.

and he will not be the last.²⁰ Granting that Murphy was more faithful to a common conception of justice than to his casebooks, the life just closed deserves to be reviewed in terms of the goals actually attempted.

SOME ELEMENTS OF MURPHY'S JUSTICE

The freedom of dissent: religion

In the Murphy philosophy, the state might neither burden the carrying on of religious practices, nor favor a particular religion or religion *per se*. Apostles of religious freedom in America have been many, and in these views Murphy held no lonely outpost. His convictions were no firmer than those of Stone, for example. Indeed, in the first flag salute case, which he quickly regretted, Murphy failed to join Stone in dissent.²¹ But with rare exceptions, no-one has upheld a more all-encompassing or thorough religious freedom than Murphy.

This is not to suggest that he was indiscriminating in his judgments or that a case was over for Murphy because one side or the other took refuge in the Lord. Instead, his own devout faith caused him to give the closest attention to cases concerning religion. Jehovah's Witnesses usually found him their protector, but when one called the police of Rochester, New Hampshire, "damned Fascists," Murphy held the language not constitutionally protected though said in conjunction with the Witnesses' religious activity;²² and he stood with the Court in limiting the right of the sect to parade in the streets.²³ But in situations over which reasonable men could differ, he regularly upheld the claim of religious freedom.

Jehovah's Witnesses' problems arose in many forms. In their struggle to win draft exemptions on the grounds of faith the Witnesses were constantly in the courts, and Murphy had the satisfaction of seeing his position in respect to the procedure for review of their draft claims pass from lone dissent into Court majority. In the first case of the series, involving the right of Witnesses to claim conscientious objection as a defense to criminal proceedings for draft evasion instead of forcing them to follow the more circuitous route of habeas corpus, Murphy in dissent said, "The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution," and accordingly he supported the more convenient remedy.²⁴

20. 'There is no important Murphy opinion which as completely warps the law to comport with felt necessities as Marshall's commerce clause opinions, considered in FRANKFURTER, *THE COMMERCE CLAUSE* (1937), or Taney's opinion in *Dred Scott v. Sanford*, 19 How. 393 (U.S. 1857), or Vinson's opinion in *United States v. United Mine Workers*, 330 U.S. 258 (1947).

21. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

22. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

23. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

24. *Falbo v. United States*, 320 U.S. 549, 561 (1944). In subsequent cases the Court,

More substantial issues arose from the efforts of the Witnesses to spread their message on the streets. Chief Justice Hughes, before Murphy's appointment, had written the leading opinion on the right to distribute hand-bills free of discrimination;²⁵ but the question whether the activity could be subjected, not to licenses, but to non-discriminatory taxes, came before Murphy. With it came the discussion of the right to distribute messages not only on the streets but from door to door. These proved the most difficult religious questions for the Court in the 1940's, and the basic tax question was decided first one way and then the other because of changing Court personnel.²⁶

Throughout these disputes, Murphy held for the maximum protection to the right to proselytize. In one instance he sardonically observed that "It would take a gifted evangelist . . . to gross enough to pay the tax,"²⁷ but whatever the amount, he thought the taxes invalid. Nor did it matter that the Witnesses sold their pamphlets: "Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas. The pamphlet, an historic weapon against oppression, is today the convenient vehicle of those with limited resources because newspaper space and radio time are expensive and the cost of establishing such enterprises great."²⁸ The state should not handicap the missionary, he argued, by charging him for street space.

The appointment of Justice Rutledge gave the proponents of this view a majority of five, a success which the deaths of Murphy and Rutledge may make momentary. The shift caused by the Rutledge appointment resulted in the opinions of May 3, 1943, reversing the tax cases²⁹ and also upholding the right of the Witnesses to proselytize from door to door unless both the municipality and the householders individually forbade their coming.³⁰ A month later the Court handed down the second flag salute opinion, this time invalidating the requirement of compulsory saluting in the schools.³¹

Murphy conceded that he had erred in the first flag salute case in

as a practical matter though without technical inconsistency, came to the Murphy result; see *Estep v. United States*, 327 U.S. 114 (1946).

25. *Lovell v. Griffin*, 303 U.S. 444 (1938).

26. *Jones v. Opelika*, 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943), in accordance with *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

27. *Jones v. Opelika*, 316 U.S. 584, 616 (1942).

28. *Id.* at 619. (Quotations throughout the text of this article have occasionally been very slightly altered to make for readability. Thus in the quote above, a citation has been omitted; and occasionally capitalization or punctuation has been altered or a word has been changed. In no instance has meaning been altered or affected.)

29. Cases cited note 26 *supra*.

30. *Martin v. Struthers*, 319 U.S. 141 (1943).

31. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

putting the symbols of national unity ahead of spiritual integrity. "Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches."³² Unity, he had found, could not be the product of a gesture, for "It is in the freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies."³³

The composite of his convictions on religious freedom from state interference emerges clearly from his opinions. The only value higher than complete religious freedom was the "maintenance of effective government and orderly society,"³⁴ and only if the menace to order were extreme would state regulation of religion be upheld.

Murphy feared state aid to religion as much as state harm to religion. Both he considered forbidden by the Constitution and, since regulation would probably follow aid, he considered them interchangeable evils. In the two great separation cases of recent years, the task of speaking for the Court fell to another, and Murphy did not write; but from his concurrence we know that he accepted the principle that state aid must be limited to welfare assistance.³⁵ The full nature of his views on this subject may be known when his personal papers are opened; but we do know that his resolution was unaffected by the criticism of some members of his own faith.

The freedom of dissent: politics

At times of extreme tension, the majority of society is tempted to crush its dissidents, and the recent war, if it had followed the pattern of its predecessors, would have afforded countless examples. Due largely to the determined purpose of a highly unusual Attorney General, Francis Biddle, there were very few political cases brought by the government during the War; and Murphy never had the opportunities of Holmes to consider from many angles the limitations, if any, on permissible political disagreement. But from the rare free speech cases and a group of denaturalization cases which came before him, we find a measure of his judgment on this score.

The denaturalization laws provide a handy method for policing the politics of those Americans born abroad because they permit denaturalization and deportation on the ground that the original certificate of naturalization was "fraudulently" or "illegally" obtained. At naturalization, the alien must take an oath that he will "support and defend the Constitution," and "bear true faith and allegiance." If he later adheres to Communism or Fascism, the government may contend that the same views were held at the time of taking the oath,

32. *Id.* at 645.

33. *Id.* at 646.

34. *Id.* at 645.

35. See cases cited note 8 *supra*.

that the adherence to the Constitution was thus not complete, and therefore that the certificate was "fraudulently" obtained. The net effect is to give a native American a far greater freedom of political action than is given the foreign born.

The *Schneiderman* case was the leading denaturalization case in the war years.³⁶ Schneiderman was brought to this country as an infant and naturalized when he reached twenty-one. Twelve years after his naturalization the government began denaturalization proceedings on the ground that he was a life-long Communist. The case, which aroused great interest, was argued and reargued for Schneiderman by Wendell Willkie and was decided in his favor five to four with Murphy writing the opinion of the Court. Beginning with the observation that the Court had heard the case because of "its possible relation to freedom of thought,"³⁷ Murphy proceeded to enunciate extraordinarily strict rules for the conduct of denaturalization proceedings, and held that the evidence in the particular case did not measure up to the standard set. The nature of those rules and the details of the case are immaterial here; they were patently the products of fully stated policy. "[T]he facts and the law should be construed as far as is reasonably possible in favor of the citizen . . . we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought. . . . We should not hold that petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of soviet republics unless we are willing so to hold with regard to those who believe in Pan-Americanism, the League of Nations, Union Now, or some other form of international collaboration."³⁸

In later cases, Murphy took a broader position than was necessary in the *Schneiderman* case. His ultimate stand, with Justice Rutledge, was that denaturalization was unconstitutional regardless of cause—that in order to avoid creating second class citizens, the government must make its final judgment at the moment of naturalization. Thereafter, native and foreign born citizens must be treated alike, each subject to valid laws for sedition or treason, but neither subject to exile and banishment.³⁹

The free speech case in World War II most reminiscent of those of World War I was *Hartzel v. United States*,⁴⁰ one of the rare prosecutions

36. *Schneiderman v. United States*, 320 U.S. 118 (1943).

37. *Id.* at 119.

38. *Id.* at 122, 132, 145.

39. In *Baumgartner v. United States*, 322 U.S. 665, 678 (1944), Murphy dissented in a denaturalization case which he thought departed from the *Schneiderman* principles. In *Knauer v. United States*, 328 U.S. 654, 675 (1946), he joined Justice Rutledge in a dissenting opinion challenging denaturalization in toto, and he adhered to these views in *Klapprott v. United States*, 335 U.S. 601, 616 (1949).

40. 322 U.S. 680 (1944).

in the second war under the Espionage Act of 1917. Hartzel, a vigorous anti-Semite and Anglophobe, had mailed some six hundred mimeographed statements to various persons in 1942 urging abandonment of the war, internal race war, and an international war of the white race against all others. He seemed to believe that it would be best for America to be occupied by Germany while the United States adjusted to these new plans. He was charged with encouraging disloyalty, refusing duty in the armed services, and obstructing recruitment.

As author of the majority opinion, Murphy found it unnecessary to reconsider constitutional aspects of the Espionage Act. He adopted the theory of Holmes' dissent in *Abrams v. United States*⁴¹ that the Act must be construed "in a strict and accurate sense." Since the Act applies only to conduct which "wilfully" achieves the results of fomenting mutiny or obstruction, Murphy construed it "in the context of a highly penal statute restricting freedom of expression" to require a deliberate purpose to affect present or potential military personnel. Finding that Hartzel's conduct was "quite consistent with a mere intent to influence public opinion and to circulate malicious political propaganda,"⁴² Murphy declared that the requisite intent was not present. "An American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective."⁴³

The *Hartzel* opinion put the requirement of specific intent so high that it made practically impossible any convictions under the Act of 1917. It amounted to a judgment of policy that the country could fight the war without repression of even the extremest dissent. This was a practical application of Madison's words in the Virginia Report on the Alien and Sedition Acts in which he conceded the existence of abuses of freedom of the press, but said that "it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits."⁴⁴

The freedom of minorities

With that acute feeling for minorities which one himself in a minority sometimes has, Murphy was a passionate defender of the rights of small groups, an automatic defender of the underdog. His greatest opportunity to give practical application to this conviction was his service as Governor General and High Commissioner of the Philippines, which his friends say he considered a high spot of his life. Throughout his service on the Court, one of his rare extracurricular public interests

41. 250 U.S. 616, 627 (1919).

42. 322 U.S. 680, 688 (1944).

43. *Id.* at 689.

44. *Mr. Madison's Report on the Virginia Resolutions* in VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND 1799 at 21, 36 (1832).

was quiet participation as advisor or negotiator on behalf of the Islanders, and he kept his flag as Governor General within his view in his private office at the Court.

In the one case seriously involving Philippine welfare to come before him, Murphy was at his most outspoken in embracing purely "practical" rather than "legal" considerations.⁴⁵ The issue was the taxability of goods imported from the Philippines between the liberation from the Japanese and the establishment of the Philippine Republic. One question was whether the particular goods were in their "original package" and entitled to tax immunity, but the more general issue was whether Art. I, sec. 10 of the Constitution, prohibiting state taxes on "imports," applied to the Philippines at all. The tax collector contended that the Philippines were not yet a "foreign" country, that shipments from them were not "imports," and that the clause therefore was inapplicable.

The Court rejected the tax collector's argument. Murphy's lone concurrence on this point deserves extensive quotation because it is so completely revealing of his conception of the function of the judge-made law as well as of his concern for the Philippines. He declared that shipments from the Philippines were "imports," a decision "compelled in good measure by practical considerations." The United States has matchless "moral and legal obligations" to the Philippines. "War has stricken their land and their peoples. Their growing economy has been largely decimated by over three years of ruthless invasion and occupation. Now, with the Islands liberated, our moral and legal obligations are greater than ever before. . . . It is clear that the Philippines cannot safely be thrown into the world market and left to shift for themselves. For the foreseeable future, at least, their economy must be closely linked to that of the United States. Accordingly it is my view that if it is reasonably possible to do so we should avoid a construction of the term 'imports' that would place Philippine products at a disadvantage on the American market. . . . If we can justifiably construe that term to prohibit state taxation on shipments from the Philippines, we shall to that extent have conformed to the national policy of aiding the Philippine reconstruction." No previous judicial interpretations absolutely preclude this result, since decisions to the contrary were merely dicta, and the result is "a highly necessary and desirable one."⁴⁶

Equally blunt was Murphy's opinion in another major territorial case, in which he joined the majority in invalidating martial law in Hawaii and also concurred specially to elaborate his theme that "the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action."⁴⁷

45. *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 691 (1945).

46. The Murphy opinion summarized here is at 324 U.S. 691-4 (1945).

47. *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946).

The Hawaiian cases involved questions national as well as territorial, because this supreme wartime bid for military control of civilian justice and civilian life could have been followed by similar proclamations on the mainland. Hence Murphy took occasion to speak generally of his "abhorrence of military rule."⁴⁸ But the military had made two special contentions particularly applicable to Hawaii; first, that the Constitution did not extend its protection there, and second, that due to the peculiar racial combinations in Hawaii, its people could not be trusted for jury service. On each point, Murphy was categorical. "The Constitution . . . applies in both spirit and letter to Hawaii,"⁴⁹ he began. Vigorously defending the Hawaiians against charges of disloyalty, he pointed to the absence of a single recorded case of sabotage or espionage among them. He protested particularly against the imputations against Japanese-Americans in Hawaii: "Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization."⁵⁰

Murphy's castigations of "racism" were a part of a larger antipathy to what might be called "groupism," or the practice of holding one member of a group responsible for the independent deeds of another. His resistance to the denaturalization of Communists was in part, as described above, because he felt it incompatible with freedom of speech; but it was also because the evidence used by the government would usually be a century of Communist writings to which any particular Communist may never have subscribed at all.⁵¹ This resistance to group liability and group discrimination was the basis of Murphy's most dramatic work on the Supreme Court, his opposition to the government's program for Japanese and Japanese-Americans during the war.

The first case in the series presented for determination the validity of a military order establishing a curfew for Japanese-Americans as well as Japanese aliens on the West Coast.⁵² The military theory was that some of this group were probably disloyal and might engage in sabotage or espionage, and that the size of the group—over 100,000—made it impossible to sort out the loyal from the disloyal. Therefore all must be at home in the night time. The Court unanimously upheld the order against the challenge that it denied due process, but Murphy concurred specially to emphasize how limited was his acquiescence. "Distinctions based on color and ancestry," he said, "are utterly inconsistent with our traditions and ideals. . . . To say that any group cannot be

48. *Ibid.*

49. *Ibid.*

50. *Id.* at 334.

51. *See* *Schneiderman v. United States*, 320 U.S. 118, 136, 146 *et seq.* (1943).

52. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

assimilated is to admit that the great American experiment has failed." The order "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany."⁵³ At the same time, Murphy conceded that if the necessity were sufficiently overwhelming, some limited inconveniences based on racial distinctions might be constitutionally tolerable. But, he stressed, what was done here went "to the very brink of constitutional power."⁵⁴ Whether even a curfew order might be imposed for a lengthy period he reserved, and he warned clearly that when it came before him, he would not uphold the government's larger claim of power to remove the Japanese-Americans bodily from the West Coast and place them in concentration camps east of the Rockies.

The latter issue came quickly, and Murphy took the stand he had predicted. When the Court upheld the removal of the Japanese-Americans from the West Coast, Murphy dissented, declaring that the action passed beyond "the very brink of constitutional power" and falls into the ugly abyss of racism."⁵⁵ Reluctant though he was to overrule the military on the factual question of necessity, he accepted the final responsibility of the judiciary to review the military decision, and concluded that it rested on an "erroneous assumption of racial guilt rather than bona fide military necessity."⁵⁶ He conceded that there might be scattered disloyal persons of many racial strains. "But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights."⁵⁷ After analyzing in detail the absence of any appreciable factual basis for the exclusion, Murphy concluded in what has fair claim to being the most solemn paragraph in any of his opinions:

"I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."⁵⁸

53. Both quotations in this paragraph are from 320 U.S. 81, 110-11 (1943).

54. *Id.* at 111.

55. *Korematsu v. United States*, 323 U.S. 214, 233 (1944). In this and the companion case of *Ex parte Endo*, 323 U.S. 283 (1944), the Court held that Japanese-Americans could be evacuated from the West Coast but that loyal Japanese-Americans could not be detained at inland points.

56. 323 U.S. 214, 235, 236 (1944).

57. *Id.* at 240.

58. *Id.* at 242.

One other Japanese problem during the war was quite different. In the case of General Yamashita, the Court dealt with the validity of General MacArthur's war trials, hearing argument on the questions, among others, of the Court's jurisdiction to review such cases, and on the fairness of the trial itself.⁵⁹ The Yamashita military trial, as Murphy and others saw it,⁶⁰ was an unadulterated legal lynching in which, so far as anyone can tell from the military tribunal's record, our military took bloody revenge for the crimes of others by executing the most important figure they happened to catch. It may be that the majority of the Supreme Court held only that the Constitution does not extend to war enemies, and that it therefore was incapable of reviewing the fairness of the military trial.⁶¹ Whatever the majority's view, Justice Murphy, with Justice Rutledge, dissented on the ground that the constitutional privileges did extend to Yamashita, that there was jurisdiction for judicial review, and that the trial had been a mockery.

Describing the military trial as "retribution" masquerading "in a cloak of false legalism,"⁶² Murphy declared that Yamashita "was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war."⁶³ Yamashita was charged neither with committing atrocities nor with having authorized them, but with having failed to take adequate steps to control his troops. Conceding that there were atrocities in number, Murphy accepted the defense view that the troops committing them had been wholly out of Yamashita's control. Murphy joined also in the extended Rutledge analysis of the proceedings which, said Rutledge, lacked "any semblance of trial as we know that institution."⁶⁴

59. *In re Yamashita*, 327 U.S. 1 (1946).

60. The authoritative account is REEL, *THE CASE OF GENERAL YAMASHITA* (1949).

61. The majority opinion is completely opaque on the critical issue. At 327 U.S. 6 the Court states one of the issues to be whether the conduct of the trial "deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment." The question would appear to be ripe for discussion at pages 22 and 23 of the opinion, but at this point the Court mysteriously slides past it without saying anything, or anything intelligible, about it. In the summary at page 25 the Court says that it has shown that no "constitutional command" was violated. In a concurring opinion in *Hirota v. MacArthur*, 338 U.S. 197, 199 (1949), Justice Douglas notes that he considers the war trials, at least in some instances, a form of political reprisal beyond the scope of judicial review. The *Yamashita* opinion makes it difficult to know whether the majority agreed or disagreed with the dissenters Murphy and Rutledge on the proposition that if Yamashita was entitled to due process, he was in fact denied it.

62. 327 U.S. 1, 26, 30 (1946).

63. *Id.* at 27, 28.

64. *Id.* at 61.

Japanese-American problems came before the Court twice more during Murphy's tenure in cases challenging, respectively, the validity of California laws aimed at keeping Japanese-Americans from owning agricultural land and the validity of California fishing restrictions on the same group.⁶⁵ Both were invalidated. In each Murphy filed special concurrences, joined by Rutledge, emphasizing in detail the factual background of race bias which underlay the legislation. Describing the statutes as "outright racial discrimination,"⁶⁶ he related fully the steps of the discriminatory process and concluded that they violated both the equal protection clause and the United Nations Charter.

The zeal against oppression of minorities evidenced in the territorial and Japanese cases accompanied Murphy's analysis of the few cases during the 1940's involving the Negro. Most of the Negro cases involved administration of criminal justice, where the principles are general enough to require separate discussion elsewhere in this essay. Relevant here, however, are the *Restrictive Covenant Cases*⁶⁷ and the white primary case,⁶⁸ in which he joined the Court in invalidating the enforcement of anti-Negro restrictions, and *Screws v. United States*⁶⁹ and *Steele v. Louisville & N.R.R. Co.*,⁷⁰ in which he was outspoken.

The *Screws* case was a prosecution of Georgia law enforcement officers under a federal civil rights act for clubbing to death, through sheer malice, a colored prisoner in their custody. Georgia had failed to indict them for murder. The Court split in four opinions which need not be reviewed in tracing Murphy's position that conviction of the law officers should be affirmed. To him the dead Negro had clearly been deprived of his life under color of state law without due process of law. This, as he saw it, brought the case under the clear terms of the statute. He had no reluctance to permit federal intervention to protect minorities where states refused to do so: "Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied."⁷¹

The *Steele* case involved economic discrimination against Negro firemen by one of the railroad brotherhoods, and the issue was ap-

65. *Oyama v. California*, 332 U.S. 633 (1948), the Murphy opinion beginning at 650; *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948), the Murphy opinion beginning at 422.

66. *Oyama v. California*, *supra* note 65, at 650.

67. *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Hurd v. Hodge*, 334 U.S. 24 (1948).

68. *Smith v. Allwright*, 321 U.S. 649 (1944).

69. 325 U.S. 91 (1945), the Murphy opinion beginning at 134.

70. 323 U.S. 192 (1944), the Murphy opinion beginning at 208.

71. *Screws v. United States*, 325 U.S. 91, 138 (1945).

propriately raised under the Railway Labor Act whether a carrier might be enjoined from carrying out a collective bargaining agreement which formalized these discriminations in job opportunities. The Court unanimously upheld the right to the injunction, and Murphy concurred specially to comment upon the "utter disregard for the dignity and the well-being of colored citizens shown by this record." In the face of this oppression, he was not content to restrict his comment to "legal niceties," preferring to rest squarely on constitutional prohibitions of "this ugly example of economic cruelty against colored citizens." If the statute gave the brotherhood standing not only to bargain, but to discriminate in bargaining, then the statute itself would be invalid; for "[t]he Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color."⁷²

It is no wonder that those engaged in litigation to end segregated education believe that a major source of strength was lost by the unexpected death of Justice Murphy.

Murphy's writings on behalf of the territorials, Japanese-Americans, and Negroes were comparatively easy, revealing for the most part more soul searching than book searching. In terms of plain, tedious work, Murphy labored more in behalf of the American Indians than of all the rest of the minorities put together.

Not all, but many, of the problems of the American Indians could be solved with money. By some bizarre reasoning, Congress has frequently preferred not to make adequate direct appropriations in behalf of Indian tribes, but rather to have them sue the United States for claimed violations of ancient treaties. Frequent special jurisdictional acts have permitted the Court of Claims and the Supreme Court to hear such claims, and thus those courts become an auxiliary to the appropriations systems, giving from the Treasury under the guise of the law of contracts what Congress has been unwilling to allow on grounds of simple humanity. This venerable system of self-deceit has worked handsomely for everyone except the Indians, who would have been considerably better off under a more generous and systematic plan of direct appropriations since the litigation is interminable and the lawyers' fees substantial.⁷³

But Murphy had to take the system as he found it. There was no particular likelihood that Congress would increase its appropriations,

72. The quotations in this paragraph are taken from 323 U.S. 192, 203, 209 (1944).

73. For a description and critique of this system see the concurring opinion of Justice Jackson, joined by Justice Black, in *Northwestern Shoshone Indians v. United States*, 324 U.S. 335, 354 (1945). This peculiar appropriations method has recently been given a new institutional form by the establishment of an Indian Claims Commission which has almost boundless authority to be generous. 60 STAT. 1049-56, 25 U.S.C. § 70 (1946). This statute should terminate claims litigation in the courts. Cf. Mr. Justice Black, concurring in *United States v. Alcea Band*, 329 U.S. 40, 54 (1946).

and in that situation Murphy considered the claim system better than nothing. He was thus immersed in the extraordinarily laborious research necessary to the disposition of Indian claims. Old treaties, legislative debates, executive agency records, old maps, all were brought to bear in these cases. In addition there were Indian tax exemption controversies.⁷⁴ Murphy wrote either majority, concurring, or special opinions in nine such cases.

Starting from the classic premise that in treaty cases all doubts are to be resolved in favor of the Indians, Murphy sided with them in whole or in part in the five treaty cases in which he wrote. There would be little profit in reviewing the substance of these cases, but a list of subjects will indicate their range: Whether, between 1870 and 1874, \$66,422 paid by the government to the Seminole Tribal Council was so clearly destined for purposes of corruption that it must be repaid; whether the Seminoles had been given too little land under a treaty of 1866;⁷⁵ whether the United States had a duty to the Creek Indians to collect in their behalf moneys for the use of their lands;⁷⁶ whether the Box Elder Treaty of 1863 should be reinterpreted in favor of the Shoshone Tribe;⁷⁷ whether an Executive Order of 1875 reserved certain lands for the Utes.⁷⁸ It was plain hard work to make these forays into antiquity.

In describing Murphy's scale of values, two elements emerge from his opinions on minority problems. First, nothing must be allowed to interfere with the operation of the melting pot. One of our highest goals is to be an integrated people, and whatever interferes with this aspiration is the enemy of American welfare. The due process, and particularly the equal protection clauses of the Constitution are the legal devices to be used to prevent the making of racial distinctions. Second, the strong must not only never abuse the weak, but must be ever generous. The more helpless the minority, the greater the American duty to it.

The administration of justice

In an early opinion on criminal procedure, Murphy observed that there was special necessity of fairness in the administration of justice "where the scales of justice may be delicately poised between guilt and innocence"⁷⁹—which is to say that some errors may be considered

74. For Murphy opinions in this area see *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943); *Mahnomen County v. United States*, 319 U.S. 474, 480 (1943); *Oklahoma Tax Comm'n. v. United States*, 319 U.S. 598, 612 (1943); *West v. Oklahoma Tax Comm'n.*, 334 U.S. 717 (1948).

75. The two Seminole cases are reported at 316 U.S. 286 and 310 (1942).

76. *Creek Nation v. United States*, 318 U.S. 629, 641 (1943).

77. *Northwestern Shoshone Indians v. United States*, 324 U.S. 335, 362 (1945).

78. *Ute Indians v. United States*, 330 U.S. 169, 180 (1947).

79. *Glasser v. United States*, 315 U.S. 60, 67 (1942).

harmless where guilt is clear. In at least one instance of silent concurrence in upholding a conviction in which both error and guilt seem apparent, he may have acted on this view.⁸⁰ Yet in the totality of his work, particularly in his later years, Murphy shifted to the premise that it was the duty of the Supreme Court to set a sound example by requiring scrupulous fairness always, without any reference either to technical guilt or innocence, or to general moral culpability.

He was particularly alert to oppose the warping of criminal statutes away from their plain purpose. No amount of *stare decisis* theory convinced him that the Mann Act could properly be used to police voluntary prostitution,⁸¹ and he strongly rejected a suggestion that the Federal Kidnapping Act might be used to punish a seduction which, however ugly, had nothing to do with kidnapping.⁸² With Murphy the statute had to be clearly applicable and the guilt personal⁸³ before a conviction could stand.

Aside from death sentence cases, in which a repugnance to the death penalty may have occasionally led him to search for almost any reason for reversal,⁸⁴ Murphy sought only to apply the constitutional principles of criminal procedure, not to remake them. The right to counsel, the right to trial by jury, the freedom from torture, and the freedom from unreasonable searches and seizures were to him high values, to be enforced to the hilt. Since so frequently law as it is administered denies one or another of these rights, the law as it is spoken has sometimes accommodated to the situation by both declaring the existence of the right and accompanying it with procedural rules making the right practically unavailable.⁸⁵ With this process Murphy had no patience. To him it was simple and clear that if a person was entitled to constitutional rights, he should have them; and his frequent majority and dissenting opinions concerning the procedures concomitant with constitutional rights were invariably in behalf of simplicity and effectiveness.⁸⁶

80. *Lisenba v. California*, 314 U.S. 219 (1941).

81. *Mortensen v. United States*, 322 U.S. 369, 376-7 (1944); *United States v. Beach*, 324 U.S. 193, 196 (1945).

82. *Chatwin v. United States*, 326 U.S. 455 (1946).

83. Murphy's views on criminal liability without fault are expressed in his dissenting opinion in *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

84. For examples of grasping at straws in death sentence cases, note Murphy's concurrence in the dissenting opinions of Justices Rutledge and Burton, respectively, in *Robinson v. United States*, 324 U.S. 282, 286 (1945), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472 (1947).

85. For brief review of recent cases on the relation of procedure to constitutional rights see Frank, 15 CH. 1, 27 (1947); 16 *id.* 1, 21 (1948); 17 *id.* 1, 29 (1949).

86. An example of Murphy's extreme irritation with what he regarded as procedural fustian is his dissent in *Carter v. Illinois*, 329 U.S. 173, 182 (1946). The majority, in considering the fairness of an Illinois trial, had declined to go behind the "common law record," despite a sufficiency of known facts outside that record to indicate that the trial

Both in criminal and civil cases, Murphy placed high premium on the jury system. He opposed any interference with either the proper selection of the jury or with its authority. To him it was vital that the jury be drawn from a cross section of the community and some of his strongest prose was written in dissents denying the constitutional propriety of the New York blue ribbon juries drawn predominantly from special classes.⁸⁷ Similarly he opposed the exclusion of wage workers from civil juries,⁸⁸ and any other device which might make the jury less than a sampling of the people.⁸⁹

Once the jury was properly constituted, he was prepared to accept its verdict on matters of fact in which constitutional rights were not involved. The cases record no instance in which he wrote to approve either the setting aside of a civil jury verdict, or the directing of a verdict.⁹⁰ This viewpoint appeared to be prevailing at the time of Murphy's death, though by a thin margin, but it is probable that a shift in the tendency of the law back toward the subordination of the civil jury will result from the new Supreme Court appointments.

Murphy's outstanding contribution to the law of criminal procedure concerned searches and seizures. Prior to recent years, the law had been that in the case of a search without a warrant as an incident to arrest, the police could seize only those subjects clearly visible.⁹¹ Under that rule an arrest could not be made a pretext for a ransacking ramble through a man's house giving the police a right to snoop where

had been improper. The majority opinion was perfectly in accord with procedural traditions. Murphy said, "Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivably could depend. Moreover, there is probably legal warrant for our not remanding the case . . . to allow those facts to be incorporated in the formal record. . . . But the result certainly does not enhance the high traditions of the judicial process. In my view, when undisputed facts appear in the record before us in a case involving a man's life or liberty, they should not be ignored if justice demands their use." *Id.* at 183.

Important Murphy opinions on points of criminal procedure are *Wade v. Mayo*, 334 U.S. 672 (1948) (exhaustion of state remedies and its relation to claim of federal rights); *Price v. Johnston*, 334 U.S. 266 (1948) (miscellaneous problems of habeas corpus).

87. *Fay v. New York*, 332 U.S. 261, 296 (1947); *Moore v. New York*, 333 U.S. 565, 569 (1948).

88. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

89. Thus Murphy joined the dissent in *Frazier v. United States*, 335 U.S. 497, 514 (1948), a case in which the majority, under peculiar circumstances, approved of a jury composed of twelve government employees.

90. Examples of Murphy opinions in behalf of the civil jury are *Jacob v. New York City*, 315 U.S. 752 (1942); *Pence v. United States*, 316 U.S. 332, 340 (1942); *Tennant v. Peoria & P. Ry.*, 321 U.S. 29 (1944). He also joined in the dissenting opinion of Justice Black in *Galloway v. United States*, 319 U.S. 372, 396 (1943), a most comprehensive and vigorous defense of the civil jury.

91. *Marron v. United States*, 275 U.S. 192 (1927), limited in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), and *United States v. Lefkowitz*, 285 U.S. 452 (1932).

they would. In *Harris v. United States*,⁹² the Court by a margin of five to four appeared⁹³ to abandon that principle. Harris was arrested in his home, and the FBI, without a search warrant, spent five hours ransacking the house. Eventually they found a sealed envelope in a bedroom drawer which contained evidence of a different offense completely unrelated to the cause of the arrest. The first offense was then abandoned, and Harris was charged with the second.

This broadening of the right to search as an incident of arrests as a practical matter almost eliminates the function of the search warrant. It means that a man's home is his castle only so long as he stays outside of it, being careful to be arrested on the streets; for if the arresting officers find him at home, he is completely denuded of privacy. Describing the police action as a resurrection of "the general warrant or writ of assistance, presumably outlawed forever from our society by the Fourth Amendment,"⁹⁴ Murphy dissented in an opinion both impassioned and scholarly. As he saw it, a social balance must be cast between the occasional capture of a criminal who might otherwise escape, and the invasion of privacy of citizens generally.

These alternatives gave an easy choice. It would be simple to arrest on any pretext as an excuse for invading a home. The device of unlimited search had in the past been a tool of political tyranny, "and history has a way of repeating itself." Murphy anticipated police ransacking of homes as incidents of arrests, looking for "anything" of a disloyal character. He would rather that a few criminals go undetected than sanction "this abandonment of the right of privacy."⁹⁵

At the next term, the Court either modified or clarified the *Harris* rule in *Trupiano v. United States*,⁹⁶ another five to four decision but this time with Murphy writing the opinion of the Court. The defendants were arrested and evidence of their crime, standing in plain sight about them, was seized without a warrant. The case thus differed from the *Harris* case in the obvious nature of the evidence seized. It differed also in that there was no conceivable reason for failing to obtain a search warrant other than sheer carelessness or caprice since a government agent had long posed as a member of the criminal band and the raid had been carefully planned. Murphy distinguished the *Harris* case on the latter ground, holding the search invalid but indicating in passing that the *Harris* rule must be limited to situations in which search warrants are not "reasonably practicable." The deaths

92. 331 U.S. 145 (1947), the Murphy dissent beginning at 183.

93. The ambiguous term is used in the text because of uncertainties as to the full scope of the opinion.

94. 331 U.S. 145, 183 (1947).

95. The quotations in the paragraph may be found *id.* at 194.

96. 334 U.S. 699 (1948).

of Justices Murphy and Rutledge make it most unlikely that the *Trupiano* exception will swallow the *Harris* rule.⁹⁷

Murphy's last search and seizure opinion was one of the half-dozen outstanding opinions written by him in the full course of his career.⁹⁸ In *Wolf v. Colorado*,⁹⁹ a state criminal case, evidence had been seized under circumstances which, if the offense had been federal, would have violated the search and seizure provision of the Fourth Amendment. Hence, under the federal rule, the evidence would have been inadmissible. The issues in the *Wolf* case were first, whether the limitation of searches and seizures of the Fourth Amendment should be considered an element of "due process," and thus be a limitation upon the states under the Fourteenth Amendment; and second, whether, if so, the evidence should, as in the federal system, be inadmissible.

The majority split the difference by holding that the states were prohibited from unreasonable searches and seizures, but that the evidence produced by such an illegal search would nonetheless be admissible. To Murphy such a decision was almost incomprehensible. Why should the Court pretend that the states were limited from making unreasonable searches and seizures if it were "unwilling to make the step which can give some meaning to the pronouncements it utters"?¹⁰⁰ Holmes had said of a proposal to permit the admission of illegally seized evidence in federal courts that "It reduces the Fourth Amendment to a form of words."¹⁰¹ The Court had previously held that if such evidence were admissible in federal proceedings, the Fourth Amendment "might as well be stricken from the Constitution."¹⁰² Since Murphy agreed completely with those earlier views, he derided the majority for tolerating "shabby business: lawlessness by officers of the law."¹⁰³

Labor relations

Unless the whole vast area of civil rights be treated as one "field," Murphy wrote more often in labor relations than in any other field of law. A survey of even his broadly important labor cases is beyond the

97. In my own view, both *Harris* and *Trupiano* were out of accord with the eminently satisfactory pre-existing law as declared in the cases cited in note 91 *supra*. The *Trupiano* seizure should have been lawful for the same reason that the *Harris* seizure should not have been lawful, *i.e.*, because of the "plain sight rule" of the earlier cases which permits seizures of illicit articles visible at the time of a lawful arrest.

98. A suggested list of the others: *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneiderman v. United States*, 320 U.S. 118 (1943); *In re Yamashita*, 327 U.S. 1 (1946); *United Mine Workers v. United States*, 330 U.S. 258 (1947); *Industrial Comm'n. v. McCartin*, 330 U.S. 622 (1947). Each is discussed briefly in the text.

99. 338 U.S. 25 (1949).

100. *Id.* at 41.

101. *Silverthorne Lbr. Co. v. United States*, 251 U.S. 385, 392 (1920).

102. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

103. 338 U.S. 25, 46 (1949).

scope of this article and would be unnecessary to the central inquiry here; for the many labor cases are wholly consistent with one another, and Murphy's underlying objectives can be discerned without studying more than a few.

Murphy's political strength was labor strength. The greatest achievement or the greatest shame of his life, depending on whether one is a friendly or hostile critic, was the peaceful handling of the sit-down strikes. In his own view, it was his greatest achievement, for it avoided bloodshed, and Murphy was a humane man.

As a humanitarian in the labor movement, it was natural that Murphy should have a primary interest in the most humane of the labor statutes, the Fair Labor Standards Act. He was a member of the platform committee at the Democratic Convention of 1936, and along with then Senator Hugo Black fought hard to obtain a party commitment to legislation for "minimum wages, maximum hours, child labor, and working conditions."¹⁰⁴ The Act he had helped to secure as a politician he helped to apply as a Justice, and he wrote majority or dissenting opinions in at least fifteen wage-hour cases. He consistently gave maximum coverage to the Act,¹⁰⁵ and most critically examined the rash of schemes to skirt its verbally simple mandate of time and one half for overtime.¹⁰⁶

In interpreting the Act, Murphy guided himself by his impression of its underlying purpose. It was an Act "remedial and humanitarian." It dealt not with "mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow or grudging manner."¹⁰⁷ And Murphy was never grudging in its application. His opinions established the right of recovery of wages for iron and coal miners for the extended and uncomfortable periods spent in passing from the surface of the earth to the place of actual labor;¹⁰⁸ and it was his opinion in behalf of portal-to-portal pay¹⁰⁹ that led to modifications of the Act by the Eightieth Congress.

104. FRANK, MR. JUSTICE BLACK 92 (1949).

105. A rare example of a Murphy dissent arguing that in the particular instance the Act was not applicable is *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 185 (1946).

106. The most important loophole in the Act is that discussed in *Walling v. Belo Corp.*, 316 U.S. 624 (1942), a 5-4 decision in which Murphy dissented. He remained one of the only members of the Court who considered it appropriate thereafter to overrule the *Belo* interpretation despite the subsequent reliance which had been placed on it, *Walling v. Halliburton Oil Well Co.*, 331 U.S. 17, 26, 27 (1947).

107. *Tenn. C. I. & R. Co. v. Muscoda Local*, 321 U.S. 590, 597 (1944).

108. *Tenn. C. I. & R. Co. v. Muscoda Local*, 321 U.S. 590 (1944); *Jewell Ridge Corp. v. Local No. 6167*, 325 U.S. 161 (1945).

109. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The sentence quoted above suggests Murphy's labor philosophy. People who work with their hands, he thought, customarily give at least as much to their employers as they get in return. They have rights, some of them stemming from the Constitution and some stemming from remedial legislation, which they themselves have won through political action. Whether in the case of the Fair Labor Standards Act, the National Labor Relations Act, or the Norris-LaGuardia Act, Murphy was prepared to insure that labor secured its due. It was rare for Murphy not to uphold the Labor Board, and normally he was aggressive in its support.¹¹⁰

In his last year on the Court a Labor-Management Relations Act case evoked for Murphy memories of his own experiences with the sit-down strikes. The Wagner and Taft-Hartley Acts recognize the rights of employees to engage in "concerted activities," a euphemism which among other things describes strikes. The issue was whether a state might, by its own action, take out of the general area of "concerted activities" particular kinds of strikes of which it disapproved, making those strikes illegal within its borders despite the Federal Act. The majority, in a somewhat ambiguous opinion, appeared to answer the question in the affirmative; and in the particular case, the intermittent strike, which is a series of quick and short work stoppages all aimed at a common goal, was declared illegal.¹¹¹ Murphy, seeing in that position an end to the federal protection of the right to strike, dissented sharply. He conceded that the Act extended no protection, under Court decisions, to "a sit-down strike, a mutiny, and a strike in violation of a contract," but beyond these exceptions he would not lightly go. The intermittent strike, said Murphy, was objectionable only because it was effective, and he for one was unwilling to say that the right to strike lost its federal protection merely because such strikes "are effective from the union's point of view."¹¹²

The two most colorful Murphy opinions concerning labor relations were in the *Thornhill* case¹¹³ and the *Lewis* case.¹¹⁴ In the former, Murphy speaking for the Court declared that the states might not constitutionally put a total prohibition on peaceful picketing, at

110. Murphy believed without mental reservation that collective bargaining was essential to modern life. See, e.g., discussion in *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 404 *et seq.* (1947). A rare instance of non-approval of a Labor Board order is *NLRB v. Virginia Elec. & P. Co.*, 314 U.S. 469 (1941). *But cf.* *Virginia Elec. & P. Co. v. NLRB*, 319 U.S. 533 (1943).

111. *International Union, U.A.W. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 245 (1949), discussed at Frank, 17 CH. 1, 7 (1949).

112. *International Union, U.A.W. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 245, 268, 269, 270 (1949).

113. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

114. *United Mine Workers v. United States*, 330 U.S. 258 (1947).

least if it were picketing for legal ends.¹¹⁵ The *Thornhill* case, which has been cited more than 300 times in published reports, had a most substantial effect on the conduct of labor relations, giving a freedom and status to picketing which it had never enjoyed before. In breadth of consequence, it has been the most significant Murphy majority opinion.

The *Lewis* case shows Murphy hitting his hardest. A peaceful but complete coal strike was paralyzing the economy. The administration had tried and had been unable to obtain legislation from Congress empowering it to break such strikes by injunction. It then invoked the legal fiction that it had "seized" the coal mines and applied for an injunction without legislative authority. The principal legal obstacle was the Norris-LaGuardia Act, which forbade injunctions in "any labor dispute," with exceptions irrelevant here. The Court, combining the fiction of government "ownership" with a legal fairy story, avoided the Norris-LaGuardia prohibition by holding it inapplicable to strikes in which the government was the "owner," thus breaking the strike, restoring the flow of coal, and bailing the Administration out of a most difficult situation.

The Murphy and Rutledge dissents illustrate the teamwork of the two. The bulk of the legal analysis is in the forty-three page Rutledge dissent in which Murphy joined. In an additional six page statement, Murphy highlighted the practical aspects of the situation. He conceded that the coal strike was bringing economic calamity; but he contended that the economic crisis did not "permit the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment."¹¹⁶ The larger menace in the situation was the precedent that the government, "at the behest of employers," might undertake to break strikes generally. The fiction of seizure, he observed, was an easy subterfuge by which the government could borrow the legal title, break the strike, and give the title back to the employer. "That," he charged, "is essentially what happened in this case."¹¹⁷ If this was to be the country's policy, Congress should adopt it rather than have the Administration and the Court create it.¹¹⁸

115. The qualifying clause should be emphasized in the light of *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949), in which Murphy joined.

116. *United Mine Workers v. United States*, 330 U.S. 258, 335, 336 (1947).

117. *Id.* at 339.

118. This attitude illustrates an important distinction in Murphy's thinking on judicial policy making under the guise of statutory interpretation. Though he was a free policy-maker himself, he attempted to guide himself by the general intent or spirit of the statute. Thus, as the foregoing text discussion indicates, he was quick to use the general purposes of the Fair Labor Standards Act, for example, as an aid in determining the meaning of a precise phrase. But he was apparently genuinely shocked at statutory interpretation squarely in conflict with the general purpose of such a statute as the Norris-LaGuardia Act.

There has been no one in American public life not drawn from trade union origins himself who has been any more cordial to the aspirations of organized labor or more kindly disposed to the welfare of all labor than Murphy was throughout his career. There is in his writing no trace either of Marxist economic theory or of American radical movements. There is, instead, a reiteration of humanitarian notions of fair play.

STATUTE

The Murphy of the opinions is neither a mystic nor a visionary. He is instead a judge of determination, anger, power, and massive intransigence. The America Murphy was trying to build had hard, concrete outlines in his mind. It was an America in which a man's religion was, so far as the state was concerned, entirely his private affair. It was an America in which the directors of political, economic, and social affairs would be totally blind to the existence of divergent racial strains among the people.¹¹⁹ It was an America in which a man could advocate any political views he might choose, free of any penalty whatsoever. It was an America in which the right to counsel meant no more and no less than that the accused should have a lawyer;¹²⁰ and in which freedom from unreasonable searches and seizures meant, without reservation or evasion, that the police must stay out of the citizen's home unless they had an unequivocally proper right to be there.

In these respects, Murphy's America was neither strange nor new. It was, within the necessary limitations of a century's difference in time, James Madison's America, too. But the Twentieth Century cannot be the Nineteenth even for the sake of old heroes or modern nostalgia, and Murphy faced problems Madison did not know. Murphy's America

119. Except to aid victims of past discriminations, as in the Indian cases.

120. Murphy was consistently of the minority upholding the right to counsel in all criminal cases of any seriousness, regardless of the poverty of the accused. *Betts v. Brady*, 316 U.S. 455, 474 (1942); *Bute v. Illinois*, 333 U.S. 640, 677 (1948).

In civil rights cases generally, Murphy supported the claimed right whenever there was any possible difference of opinion on the validity of the claim. During his last three years on the Court, his position in all non-unanimous civil rights cases, reduced to numerical totals and compared to his brethren, was as follows:

Distribution of Votes in Non-unanimous Civil Rights Cases, Oct. 1946-1948 Terms		
	<i>In support of the claimed right</i>	<i>In denial of the claimed right</i>
Vinson	8	49
Black	39	17
Reed	8	49
Frankfurter	23	34
Douglas	47	10
Murphy	53	3
Jackson	14	41
Rutledge	52	4
Burton	10	47

The data on which the table is based are discussed in Frank, 17 *CHI.* 1, 35 (1949).

included the freedom of the individual from the state, but freedom from a state more powerful than any had been before. No judge has ever envisioned the federal power more broadly. Murphy meant that power to be used. He stood for real utility regulation;¹²¹ for collective bargaining and strong unions; for a wage floor and an hour limit throughout industry; for the most vigorous enforcement of laws for the benefit of labor, agriculture,¹²² and the consumer.¹²³

To achieve these ends, Murphy's jurisprudence took for its guide less the cases, legislative histories, and statutory refinements which are usually the lawyer's tools, and more the Constitution itself and the social principles of President Roosevelt. Occasionally unsure of himself at the beginning of his judicial service,¹²⁴ he finally set his direction clearly and held to it.

To write of one Justice, rather than of the institution on which he served, inevitably creates the misimpression of a man in a vacuum. Murphy was not alone. Before March, 1943, the dissent or concurrence of Black, Douglas, and Murphy was a common by-line, and after that date the appointment of Rutledge, Murphy's closest intellectual ally, brought the group to four.¹²⁵ But the frequent cohesion of this group should not obscure their great differences in outlook, in notion of the judicial function, and in method of craftsmanship.¹²⁵ It is important in appraising Murphy to remember that though he teamed well with these brothers, three of the strongest men and ablest craftsmen in the Court's history, he was not swallowed or submerged by them. He retained the independence of a determined man.

He who would strike history's balance on a man newly dead risks

121. See, for example, his position in *Federal Power Comm'n. v. Naural Gas Pipeline Co.*, 315 U.S. 575, 599 (1942); *Federal Power Comm'n. v. Hope Nat. Gas. Co.*, 320 U.S. 591 (1944).

122. One of many examples is his position in *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 692 (1943).

123. See, for example, his position in *United States v. Columbia Steel Co.*, 334 U.S. 495, 534 (1948), and his dissent in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947).

124. Commented upon in Rodell, *Felix Frankfurter, Conservative*, 183 *HARVARD* 449, 457, 458 (1941).

125. At the 1947 and 1948 terms, the number of Murphy's agreements with each of his brethren in the 61 most important cases in which he participated was as follows:

Vinson	30	Douglas	48
Black	49	Jackson	21
Reed	29	Rutledge	54
Frankfurter	27	Burton	23

These figures are taken from tables fully explained in Frank, 16 *CHI.* 1, 47 (1948); and 17 *id.* 1, 45 (1949).

126. Thus in terms of such jurisprudential disputes as that over the proper extent of judicial policy making, the four cannot rationally be easily lumped into a group; but *cf.* Schlesinger, *supra* note 2. In a large number of the opinions discussed in the text above, Murphy was in disagreement with one or more of these three brethren.

almost certain correction. Yet posterity may find some aid in the appraisals of the present: Frank Murphy as a Justice of the Supreme Court of the United States was the embodiment in a high place of a lowly but persistent American ideal of human justice. He consistently, and with effective prose, sought to establish or to reinforce in American law basic constitutional principles of human freedom, and basic principles of social justice. His philosophy was clear and he firmly adhered to it. To the limited extent that others shared them, his views prevailed; but in matters most important to him, he was not in the majority. His death, with that of his brother Rutledge, makes it improbable that some of his most basic convictions will retain adherents even in a substantial minority of the Supreme Court. Yet the courage and clarity of his writing will provide him an honored place when the history of the judiciary in the 1940's is written.